

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JAMES D. MITCHELL, JR.,

Petitioner,

v.

NORM ROBINSON, WARDEN,

Respondent.

CASE NOS.: 2:13-CV-0546

2:13-CV-908

JUDGE GEORGE C. SMITH

MAGISTRATE JUDGE ABEL

OPINION AND ORDER

On January 13, 2014, the Magistrate Judge issued a *Report and Recommendation* recommending that the instant petition for a writ of habeas corpus be denied and that this action be dismissed. Petitioner has filed an *Objection* to the Magistrate Judge's *Report and Recommendation*. For the reasons that follow, Petitioner's *Objection*, Doc. No. 16, is **OVERRULED**. The *Report and Recommendation* is **ADOPTED** and **AFFIRMED**. This action is hereby **DISMISSED**.

Petitioner objects to Magistrate Judge Abel's recommendation that Case No. 2:13-CV-908 be transferred to the United States Court of Appeals for the Sixth Circuit as a successive petition. However, the Magistrate Judge recommended that the claims set forth in Case No. 2:13-CV-0546 be dismissed on the merits, and that the claims set forth in Case No. 2:13-CV-908 (two ineffective assistance of trial counsel claims) be dismissed as procedurally defaulted. *See Report and Recommendation*, Doc. No. 14. Although the last paragraph of the *Report and Recommendation* indicates that the latter case should be transferred to the Court of Appeals, this plainly is a typographical error, in view of the remainder of the *Report and Recommendation*.

The body of the *Report and Recommendation* clearly holds that Case No. 13-CV-908 is not a successive petition because it was filed while Case No. 2:13-cv-546 was still pending. Consequently, following *Beard v. Ohio*, 2013 WL 1281929, at *2 (S.D. Ohio March 27, 2013), the second habeas corpus action should be considered as a motion to amend the first habeas corpus petition. January 13, 2014 *Report and Recommendation* pp. 14-15, Doc. 14, PageID 635-36. The *Report and Recommendation* went on to correctly hold that the ineffective assistance of counsel claims were procedurally barred because they were not timely presented to the Ohio courts. *Id.*, pp. 15-19, PageID 636-40.

WHEREUPON, Petitioner's *Objection* is OVERRULED. The *Report and Recommendation* is **ADOPTED** and **AFFIRMED**. This action is hereby dismissed because Petitioner's claims in Case No. 2:13-CV-546 fail to provide a basis for federal habeas corpus relief and his claims in Case No. 2:13-CV-908 are procedurally defaulted.

IT IS SO ORDERED.

s/ George C. Smith
GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT